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No. 157

In the Supreme Court of the United States

OCTOBER TERM, 1947

COMMONWEALTH OF MASSACHUSETTS, ET AL., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 13–18) is reported at 65 F. Supp. 763. The opinion of the Circuit Court of Appeals (R. 29–33) is reported at 160 F. 2d 614.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 2, 1947. (R. 33). The petition for a writ of certiorari was filed on June 27, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

After the priority of the United States for payment of the debts due it has attached under Section 3466 of the Revised Statutes, whether the voluntary assignee for the benefit of creditors of the assets of the insolvent taxpayer was permitted to pay the claim of the State for unemployment compensation contributions and secure a credit for such payment against the unpaid federal unemployment compensation taxes under Section 902 of the Social Security Act, as amended, thus defeating the priority of the United States.

STATUTES INVOLVED

The pertinent parts of the applicable statutes are set forth in the Appendix, *infra*, pp. 10–12.

STATEMENT

The facts, as stipulated (R. 18–21) and found by the District Court (R. 13), may be summarized as follows:

On February 3, 1939, Somerville Sales and Service, Inc., which was then insolvent in the bankruptcy sense, made a voluntary assignment to Carlton W. Spencer for the benefit of creditors. Spencer, the assignee, converted the assets into cash, realizing the amount of $1,135.11. (R. 13, 19, 20.)

The Collector of Internal Revenue seasonably filed claims with the assignee for 1938 and 1939 federal insurance contributions tax under Title VIII of the Social Security Act in the amount of

$690.05, for 1938 federal unemployment compensation tax under Title IX of the Social Security Act in the amount of $963.08, and for 1939 capital stock tax in the amount of $21, all of which had been duly assessed against the assignor corporation. The Commonwealth of Massachusetts (hereinafter referred to as "the State") likewise filed a claim with the assignee for $803.72, representing 1938 and 1939 state unemployment compensation contributions and interest due from the assignor. (R. 19, 21.)

On October 6, 1939, the assignee disbursed $803.72 to the State in full payment of its claim and paid $331.39, the amount remaining in his hands, to the Collector of Internal Revenue, who credited it against the amount due as federal insurance contributions (Title VIII) tax. (R. 20.) The balance claimed by the United States of $1,342.74 with interest was not paid. (R. 19, 20, 21.)

The United States commenced this suit against the assignee to establish the priority of its claims for taxes under Section 3466 of the Revised Statutes, *infra,* p. 10, and to enforce a personal liability against the assignee to the extent of $803.72 under Section 3467 of the Revised Statutes, *infra,* p. 10, by reason of his payment of the Massachusetts taxes due from the assignor before he had satisfied the taxes due the United States. (R. 1–3, 18.) The State intervened, asserting that it was entitled by law to keep the

$803.72 received from the assignee. (R. 8–11.) It agreed, however, to pay this amount to the United States, if the payment by the assignee to it should be determined to have been made in disregard of the priority of the United States under Section 3466. (R. 13.)

The District Court held that under Section 3466 the United States had priority as to the full amount of the capital stock and federal insurance contributions (Title VIII) taxes due it, and as to 10% of the federal unemployment compensation (Title IX) taxes due it. (R. 13–18.) It ordered the State to pay $610.27 to the United States in liquidation of these taxes and the interest due thereon. (R. 12, 18.) From this judgment both the United States and the State appealed. (R. 12.)

The Circuit Court of Appeals reversed the District Court in part, holding that the United States has complete priority under Section 3466 with respect to its entire claim for unpaid federal unemployment compensation taxes, as well as to its claims for federal insurance contributions and capital stock taxes. (R. 30–33.)

ARGUMENT

We believe that the State has shown no adequate reason for the granting of a writ of certiorari. Its claim (Pet. 4) that the question in this case has not been decided by this Court disregards the fact that *Illinois* v. *United States*, 328 U. S. 8, plainly forecloses its contention here.

There the Court held that under Section 3466 of the Revised Statutes the claims of the United States for both federal insurance contributions taxes under Title VIII of the Social Security Act and federal unemployment compensation taxes under Title IX of the Act were invested with priority over the claim of the State of Illinois for taxes under its Unemployment Compensation Act. This ruling was so summarized in *Illinois* v. *Campbell*, 329 U. S. 362, 366–367.[1] While the Court did not specifically include the capital stock taxes there due the United States within its decision in *Illinois* v. *United States*, *supra* (see footnote 1, p. 9), it follows *a fortiori* that these taxes are debts which are granted priority by Section 3466. *Price* v. *United States*, 269 U. S. 492, 499; *Stripe* v. *United States*, 269 U. S. 503.

As the court below held (R. 30–33), the assignee's payment of the tax due the State and claim for a credit for the payment against the unpaid federal tax under Section 902 of the Social Security Act, *infra*, p. 11, was not effective to destroy the supremacy of the claim of the United States for prior payment in full of all the taxes due it. The priority of the United States under Section 3466 of the Revised Statutes, *infra*, p. 10,

[1] The District Court's opinion in this case (R. 13–18) was rendered prior to *Illinois* v. *Campbell*, *supra*, which expressly stated that both the Title VIII and Title IX federal taxes were held to be entitled to priority under the Court's previous decision in *Illinois* v. *United States*, *supra*.

as to all three kinds of tax attached when the taxpayer, being insolvent in the bankruptcy sense, made the assignment for the benefit of creditors in February, 1939, or to the extent the taxes were assessed after that date, not later than the dates of assessment, and perhaps before. Cf. *Spokane County* v. *United States*, 279 U. S. 80, 93; *United States* v. *Oklahoma*, 261 U. S. 253, 260; *United States* v. *Waddill Co.*, 323 U. S. 353. It is clear that all of these dates were prior to October 6, 1939.[2] At the time the United States acquired priority, the taxpayer had not paid any amount to the State as contributions and it or its assignee could not then claim a credit under Section 902 against the Title IX tax due the United States.[3]

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[2] The stipulation of facts does not give the dates on which the Commissioner assessed the taxes, stating only that they were "duly and seasonably" assessed. (R. 19.) Cf. Paragraph 4 of the assignee's answer. (R. 5.) However, the assessment dates were all prior to October, 1939, as is clear from the fact that the Collector filed proofs of claims, original and amended, for the taxes, with the assignee on March 29, May 13, and June 12, 1939, and on May 8, 1940. (Par. V of complaint (R. 3), admitted (R. 5).) Information received from the Bureau of Internal Revenue confirms that all the taxes due the United States, here involved, were assessed prior to June 13, 1939, the last assessment being made on June 12, 1939, in respect of the 1939 capital stock tax. Thus, priority had unquestionably attached as to all the taxes in favor of the United States before the assignee disbursed the amount of $803.72 to the State on October 6, 1939.

[3] Section 902 of the Social Security Act Amendments of 1939, *infra*, p. 12, authorizes the credit in certain circumstances only upon actual payment to the State prior

As is implicit in *Illinois* v. *United States, supra,* the assignee could not thereafter make a payment to the State without violating Section 3466 because the debts due the United States were required to be satisfied first, and the debts due it exhaust the fund. Whatever option the taxpayer may have had to pay contributions to the State and claim a credit under Section 902 terminated at the time Section 3466 took effect. Section 3466 was not superseded or amended by any provision of the Social Security Act, including Section 902. Cf. *Illinois* v. *United States, supra.*

Moreover, if a taxpayer's assignee is allowed to pay a state's claim and take credit against the Title IX tax due the United States after Section 3466 has come into operation, the result will be to defeat, to a large extent, the priority of the United States, contrary to Congress' intention. In this case if the payment to the State is permitted to stand and a credit against the claim of the United States for Title IX taxes is allowed, the effect is not only to reduce the claim of the United States for Title IX taxes but also, be-

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to the sixtieth day after the date of enactment of the Act, which was August 10, 1939. The payment by the assignee here was on October 6, 1939, within this time limit, but it was after the priority of the United States had attached. It is doubtful also that a voluntary assignee for the benefit of creditors is entitled to claim a credit under Section 902, since he is not the taxpayer or a fiduciary appointed or acting under court order.

cause the insolvent's assets are depleted, to erase its priority in part as to the other debts due it.[4]

It follows that the payment to the State by the assignee was in disregard of the priority of the United States under Section 3466, the precise situation in which the State has agreed to return the amount of $803.72 to the United States.[5] (R. 13.)

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[4] The amount left for the United States after payment of the State's claim was only $331.39, whereas the total amount of its claims for Title VIII and capital stock taxes was $711.05. (R. 19.) The State's contention here gives even less effect to the priority of the United States than did the District Court, which ordered the State to pay $610.27 to the United States (R. 12), on the theory that the United States was entitled to receive prior payment of the Title VIII and capital stock taxes in full and 10% of the Title IX taxes (R. 18). But even on the District Court's theory its computation was wrong. Since the Title VIII and capital stock tax claims should be paid first, only $424.06 of the total fund ($1,135.11) remained for the Title IX and State claims. Section 902 allows a credit against Title IX tax only for the amount actually paid to a State, but not to exceed 90% of the federal tax. Thus, even assuming that the entire $424.06 remaining is available as a credit against the Title IX tax of $936.08, there still remains an unsatisfied federal claim for Title IX taxes amounting to $539.02, which is in excess of the $424.06 available to satisfy both it and the State. Under its priority the United States should be awarded the $424.06 also, with the result that even under the District Court's view, which we believe is erroneous, a correct computation would give the entire available fund to the United States.

[5] As we have shown, the credit, permitted by Section 902 in some circumstances, was not allowable here. Since there is no credit, the argument in the brief *amicus curiae* of the State

CONCLUSION

The decision of the court below is clearly correct, and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1947.

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of Illinois (pp. 23–26) that the debts due the United States may be "satisfied" within the meaning of Section 3466 by means of the offset credit for amounts paid a state is not pertinent to this case. The State's claim for contributions is of course not a debt due the United States entitled to priority under Section 3466. *Illinois* v. *United States*, *supra*.

APPENDIX

Revised Statutes:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. (31 U. S. C., 1940 ed., Sec. 191.)

SEC. 3467 (as amended by Sec. 518 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680). Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid. (31 U. S. C., 1940 ed., Sec. 192.)

Social Security Act, c. 531, 49 Stat. 620:

SEC. 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

(1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;

(2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;

(3) With respect to employment after December 31, 1937, the rate shall be 3 per centum. (42 U. S. C., 1940 ed., Sec. 1101.)

SEC. 902. The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in section 903. (42 U. S. C., 1940 ed., Sec. 1102.)

SEC. 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some

twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more. * * * (42 U. S. C., 1940 ed., Sec. 1107.)

Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360:

SEC. 902. (a) Against the tax imposed by section 901 of the Social Security Act for the calendar year 1936, 1937, or 1938, any taxpayer shall be allowed credit for the amount of contributions, with respect to employment during such year, paid by him into an unemployment fund under a State law—

(1) Before the sixtieth day after the date of the enactment of this Act;

(2) On or after such sixtieth day, with respect to wages paid after the fortieth day after such date of enactment:

(3) Without regard to the date of payment, if the assets of the taxpayer are, at any time during the fifty-nine-day period following such date of enactment, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction.

* * * * *

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